Virgin Records America, Inc v. Thomas
Doc. 283

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

CAPITOL RECORDS, INC., *et al.*,

Plaintiffs,

vs.

JAMMIE THOMAS,

Defendant.

Case No.: 06cv1497-MJD/RLE

PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE FAIR USE DEFENSE

On the eve of trial, just yesterday, Defendant indicated for the first time that she intends to assert the affirmative defense of fair use in this case. Defendant's fair use defense should be excluded for at least two reasons. First, Defendant failed to assert fair use as an affirmative defense at any time until just yesterday, two weeks before trial, and, therefore, has waived the defense. Second, every court to have considered the fair use defense in the context of illegal file sharing has rejected it, as the defense fails as a matter of law. For these and other reasons explained below, the Court should enter an order *in limine* precluding Defendant from asserting a fair use defense in this case.

I. Fair Use Is An Affirmative Defense And Has Been Waived.

Fair use is an affirmative defense that is waived if not plead in an answer. As Judge Kyle explained in *Belmore v. City Pages,* 880 F. Supp. 673, 676 (D. Minn. 1995), "The fair use doctrine is an affirmative defense to a copyright infringement action." Similarly, as explained in Nimmer on Copyright, "The affirmative defense that is most distinctive to the copyright sphere is fair use." 3-12 Nimmer on Copyright § 12.11. *See Sugar Busters LLC v. Brennan*, 177 F.3d 258, 271 (5th Cir. La. 1999) ("Fair use is an affirmative defense that is usually waived if not affirmatively pled under Federal Rule of Civil Procedure 8(c)."); *Tavory v. NTP, Inc.*, 495 F.

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Supp. 2d 531, 538 (E.D. Va. 2007) ("Fair use exists as an affirmative defense to copyright infringement.").

Under Fed. R. Civ. P. 8(c), an affirmative defense that is not raised in Defendant's answer is waived. *See Bechtold v. City of Rosemount,* 104 F.3d 1062, 1068 (8th Cir. Minn. 1997) (under Rule 8(c), affirmative defenses "must generally be pled or else they may be deemed waived."); *Modern Leasing, Inc. v. Falcon Mfg. of California, Inc.*, 888 F.2d 59, 62 (8th Cir. Iowa 1989) (finding, in the context of a failure to plead the affirmative defense of mitigation that, failure to plead an affirmative defense "results in a waiver of that defense and its exclusion from the case.").

The reasoning behind requiring that the affirmative defense of fair use be raised in an answer is infallible and that is, in the absence of notice, the copyright holder does not gather evidence or prepare witnesses to rebut the defense of fair use. In the absence of notice, a copyright holder gets shanghaied at trial, which is exactly what the Federal Rules of Civil Procedure seek to avoid. Specifically, in this case, Defendant failed to assert fair use in her Answer (Doc. No. 3), at the first trial, or at any time prior May 31, 2009, when Defendant submitted a proposed jury instruction on fair use. Plaintiffs have taken no discovery regarding Defendant's putative fair use defense and had no reasonable notice that it would be an issue at trial. Allowing Defendant to proffer a new affirmative defense, on the eve of trial, and on which Plaintiffs have been given no opportunity to take discovery, would be highly and unfairly prejudicial to Plaintiffs and should not be allowed. As Defendant failed to plead the affirmative defense of fair use at any time prior to trial, it has been waived and should be excluded.

II. The Affirmative Defense Of Fair Use Has Been Consistently Rejected In The Peer-to-Peer Context And Fails As A Matter Of Law.

Fair use is a statutory exception to copyright and in order to survive, it must fall within the narrow confines of the statutory exception. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 590 (1994). Section 107 of the 1976 Copyright Act instructs that "fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright." 17 U.S.C. § 107. In the context of peer-to-peer file-sharing networks, courts have consistently rejected the fair use defense as a matter of law. In *BMG Music v. Gonzalez,* 430 F.3d 888, 890 (7th Cir. 2005), a KaZaA peer-to-peer file-sharing case, Judge Easterbrook explained:

> Music downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying originals. . . . It is no surprise, therefore, that the only appellate decision on point has held that downloading copyrighted songs cannot be defended as fair use, whether or not the recipient plans to buy songs she likes well enough to spring for. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014-19 (9th Cir. 2001). *See also UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (holding that downloads are not fair use even if the downloader already owns a copy).
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> With all of these means available to consumers who want to choose where to spend their money, **downloading full copies of copyrighted material without compensation to authors cannot be deemed "fair use." Copyright law lets authors make their own decisions about how best to promote their works; copiers such as Gonzalez cannot ask courts (and juries) to second-guess the market and call wholesale copying "fair use" if they think that authors err in understanding their own economic interests or that Congress erred in granting authors the rights in the copyright statute.**

Id. at 890-91 (emphasis added). Similarly, in *Napster,* 239 F.3d at 1014-19, Napster argued that its users were not committing copyright infringement but were, instead, making fair use of the material. The Ninth Circuit rejected this argument, analyzing the four fair use factors in the peer-to-peer file-sharing context, finding that peer-to-peer file sharing fails all four factors. In *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), the court again rejected the fair use defense in the peer-to-peer context, holding that "on any view, defendant's 'fair use' defense is indefensible and must be denied as a matter of law. *Id.* at 352 (emphasis added). Similarly, in this case, this Court should follow its sister courts in rejecting Defendant's attempt to assert the fair use defense -- for the first time and at the eleventh hour -- as a matter of law.

III. The Supreme Court's Decision in *Sony* Does Not Support Defendant's Contention That Fair Use Is Presumed In This Case.

In her proposed jury instructions, and in discussions with counsel regarding Defendant's assertion of the fair use defense, Defendant's counsel has stated that the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1983), establishes that a non-commercial infringer is entitled to a presumption of fair use. Defendant's position is incorrect for two reasons. First, *Sony* does not hold that non-commercial infringers are entitled to a presumption of fair use and multiple Supreme Court decisions establish conclusively that fair use remains an affirmative defense, even in a non-commercial infringement context. Second, Defendant's actions constitute commercial infringement.

A. *Sony* Does Not Shift The Burden Of Fair Use To Plaintiffs In Non-Commercial Cases.

Defendant is simply wrong as a matter of law when she argues that *Sony* establishes that fair use is presumed in non-commercial cases. One need only look to the subsequent Supreme Court decisions on fair use to determine that is not the law and fair use remains an affirmative defense, even in a non-commercial infringement context. *See Campbell v. Acuff-Rose Music*, 510 U.S. 569, 591 (U.S. 1994) (citing *Sony extensively* and holding that "fair use is an

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affirmative defense."); *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 563 (U.S. 1985) (citing *Sony* and holding that Congress "structured the [fair use] provision as an affirmative defense requiring a case-by-case analysis.")

Moreover, *Sony* dealt with fair use in the narrow case of time-shifting, where a television viewer is unable to watch a program at the time it was aired and records it for later viewing. As the Seventh Circuit explained in *Gonzalez*, "time shifting this is not."

> A copy downloaded, played, and retained on one's hard drive for future use is a direct substitute for a purchased copy--and without the benefit of the license fee paid to the broadcaster. The premise of Betamax is that the broadcast was licensed for one transmission and thus one viewing. Betamax held that shifting the time of this single viewing is fair use. The files that Gonzalez obtained, by contrast, were posted in violation of copyright law; there was no license covering a single transmission or hearing--and, to repeat, Gonzalez kept the copies. Time-shifting by an authorized recipient this is not.

Gonzalez, 430 F.3d 888, 890. And importantly, in *Sony*, it was the defendant that put forward the fair use defense; the plaintiffs did not attempt to, and were not required to, prove that there was no fair use. Furthermore, the issues in *Sony* were reconsidered by the Court in the peer-to-peer context in the recent decision of *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), in which plaintiffs never presented, nor needed to present, evidence of fair use.

Fair use is an affirmative defense, in all cases, and the Supreme Court has so held in numerous cases. In fact, the "presumption of fair use" that Defendant asserts is nowhere in the *Sony* decision. *Sony* simply holds that, in analyzing the four factors under fair use, the non-commercial nature of the infringement may create a presumption, in certain circumstances, regarding the purpose and character of the infringement (factor 1) and/or the effect on the market (factor 4). *Sony*, 464 U.S. at 448-52. However, the Supreme Court continues to hold that fair use remains, at all times, an affirmative defense, for which Defendant has the burden of proof.

See Campbell v. Acuff-Rose Music, 510 U.S. 569, 591 (U.S. 1994) (citing *Sony extensively* and holding that "fair use is an affirmative defense."); *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 563 (U.S. 1985) (citing *Sony* and holding that Congress "structured the [fair use] provision as an affirmative defense requiring a case-by-case analysis.")

B. The Filesharing At Issue Constitutes Commercial Infringement.

A person who engages in file-sharing does so with the expectation of receiving copyrighted works in return and, thus, does so for financial gain. In *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), the Ninth Circuit specifically held that the file trading by Napster users constituted a "commercial use" for purposes of the fair use analysis. *Id.* at 1015 ("Repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use."). *See Gonzalez,* 430 F.3d at 890 ("Gonzalez was not engaged in a nonprofit use; she downloaded (and kept) whole copyrighted songs (for which, as with poetry, copying of more than a couplet or two is deemed excessive); and she did this despite the fact that these works are often sold per song as well as per album."). Not only has Defendant obtained hundreds of works without paying for them, thus rendering her a commercial infringer as defined above, she has also distributed those works to others free of charge. These actions have two different commercial impacts: (1) Defendant is saving money by not paying for the copyrighted works, and (2) the record companies are denied sales both to Defendant and to others as a result of her infringement. *See Gonzalez*, 430 F.3d at 891 (a copy downloaded, played, and retained on one's hard drive for future use is a direct substitute for a purchased copy). Moreover, Defendant could not argue that her infringement served anything other than her own private interests. The self-interested nature of her acts further precludes any fair use argument.

Defendant failed to raise fair use as an affirmative defense in her Answer, the first trial, or at time prior to submission of Defendant's jury instructions. Therefore, she has waived the fair use defense and it should be excluded.

Respectfully submitted this 1st day of June 2009.

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